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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 820

BECKER STEEL COMPANY OF AMERICA, PETITIONER

v.

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE United States, in his Official Capacity as Alien Property Custodian, and William A. Julian, as Treasurer of the United States

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 20–23) is not reported officially. The *per curiam* opinion of the Circuit Court of Appeals, adopting the opinion of the District Court (R. 30), has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 11, 1935 (R. 31). The petition

for a writ of certiorari was filed March 27, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a United States district court has jurisdiction in an action against the Alien Property Custodian and the Treasurer of the United States for the recovery of a sum of money not in the possession of either of them.

STATUTE INVOLVED

The applicable portion of the statute involved is set forth in the Appendix, *infra*, pp. 9–10.

STATEMENT

The facts set forth in the complaint of the petitioner may be summarized as follows (R. 3–17):

The petitioner, an American national (R. 3), was the owner of 5,000 shares of its own stock, which shares of stock on or about July 12, 1918, were seized by A. Mitchell Palmer, the then Alien Property Custodian, as being in fact the property of an enemy alien (R. 5–6).

The petitioner recovered 2,500 shares of this stock in a suit in the United States District Court for the Southern District of West Virginia (R. 6). The remaining 2,500 shares of stock were sold by the Alien Property Custodian on or about February 20, 1919, for the sum of $20,000 (R. 6). Out

of this sum the Alien Property Custodian paid $3,887.84 for expenses incident to the sale of the stock (R. 7). The petitioner thereafter instituted suit against the Alien Property Custodian for the recovery of the sum of $20,000, and on or about August 21, 1925, a decree was entered in favor of the petitioner (R. 8–9).

The Alien Property Custodian offered to deliver to the petitioner the sum of $16,112.16 which he had in his possession, on condition that the petitioner would sign a warrant of satisfaction in full of the decree of the District Court (R. 11). The petitioner signed such a release (R. 11–12). Thereafter, in the year 1927, the then Alien Property Custodian voluntarily paid to the petitioner interest which had been earned on the sum of $16,112.16 during the time it had been in his possession (R. 12).

The petitioner on or about July 24, 1934, instituted a suit in the District Court for the Southern District of New York, asking judgment against the respondents in the sum of $3,887.84 with interest thereon (R. 1, 17). The respondents on August 9, 1934, filed a motion to dismiss the complaint for lack of jurisdiction (R. 17–18), which motion was granted on September 28, 1934 (R. 19). On appeal the United States Circuit Court of Appeals for the Second Circuit by a *per curiam* opinion affirmed the order of the District Court (R. 31).

ARGUMENT

The sole question raised in the instant case is that of the jurisdiction of a district court of the United States to entertain a suit against the Alien Property Custodian and the Treasurer of the United States for the recovery of a sum of money which was not in their possession at the time the suit was instituted. Both the District Court and the court below properly, we submit, held that no such jurisdiction existed.

It is conceded that the instant case being a suit against the Alien Property Custodian is in effect a suit against the United States. *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591; *Von Bruning* v. *Sutherland*, 29 F. (2d) 631 (App. D. C.) (Petitioner's Brief, p. 29). The law is well settled that the United States cannot be sued without its consent. *Turner* v. *United States*, 248 U. S. 354, 359; *Lynch* v. *United States*, 292 U. S. 571, 582. The law is equally well settled that the United States can be sued only in such courts and on such conditions as it may see fit to permit. *United States* v. *Babcock*, 250 U. S. 328, 331; *Schillinger* v. *United States*, 155 U. S. 163, 166.

The only statutory authority for a suit by a citizen of the United States or a non-enemy alien to recover property or money improperly seized by the Alien Property Custodian is conferred by Section 9 (a) of the Trading with the Enemy Act, *infra*, pp. 9–10. This section provides that where

money or other property of such an individual has been seized by the Alien Property Custodian and "held by him or by the Treasurer of the United States", such person upon proper application may recover by an appropriate order the money "so held", or if such an order be not issued, the person aggrieved may institute a suit in the appropriate district court of the United States, and if the claim be established, the court shall order the payment or delivery of the money or other property "so held by the Alien Property Custodian or by the Treasurer of the United States,"

The statute reiterates, with reference to the Alien Property Custodian and the Treasurer of the United States, the words "hold" and "held." It follows that this section authorized those whose property had been improperly seized by the Alien Property Custodian to recover only the property or money "held by the Alien Property Custodian or by the Treasurer of the United States." *Kutroff* v. *Sutherland*, 66 F. (2d) 500 (C. C. A. 2d). Nor is there any language contained therein authorizing the recovery of any damages which might have been occasioned by the seizure of the property or its detention, notwithstanding the fact that such propery was mistakenly taken from an innocent party. It has been held that a suit would not lie against the Alien Property Custodian for damage to real property occupied by the Alien Property Custodian. *Von Bruning* v. *Sutherland, supra.*

It is admitted in the instant case that at the time of the institution of this suit neither the Alien Property Custodian nor the Treasurer of the United States had in his possession the money for the recovery of which the petitioner instituted this suit. That money had been paid out as expenses incident to the sale of the property of the petitioner long before the institution either of this suit or the one in which the petitioner succeeded in recovering the money which actually was in the hands of the Alien Property Custodian. Expenses of this nature have never been held to be a recoverable item in a suit to recover from the Alien Property Custodian property or funds improperly seized.[1] *Henkels* v. *Sutherland,* 271 U. S. 298; *Escher* v. *Woods,* 281 U. S. 379; *Kuttroff* v. *Sutherland,* 56 F. (2d) 862, 863 (S. D. N. Y.).

It is to be observed that in paragraph 19 of the complaint (R. 11–12), the petitioner admits that

[1] In fact it would appear that Section 7 (c) of the Act, as amended, precludes the recovery of expenses incident to the sale of property seized. This section provides in part (c. 201, 40 Stat. 1020, 1021, U. S. C. A., Title 50, App. Sec. 7 (c)): "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

it signed a warrant in full satisfaction of the decree of August 21, 1925, directing that there be paid to it the sum of $20,000. The petitioner does not allege that this release is invalid, nor did it ask to have the same set aside. It would seem that this recital in the complaint alone would be sufficient to justify the dismissal thereof. While the District Court did not pass directly upon this question, it intimated that the existence of the release might possibly of itself constitute a defense to this action.

The petitioner alleges that the decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Vowinckel* v. *Sutherland*, 24 F. (2d) 196. We perceive no conflict. In the case at bar the expenses were incident to the sale of the property, and were not held by the Alien Property Custodian at the time suit was instituted. In the *Vowinckel* case, the expenses deducted were those incurred in the defense of the suit, and obviously must have been held by the Alien Property Custodian at the time the suit was brought. In fact, the court's decision in that case was based upon the assumption that the sum there involved was still in the custody of the Alien Property Custodian.

We submit that the decision of the court below, in holding that the District Court had no jurisdiction of a claim of this character, is correct. There exists no conflict, and the question raised by the petitioner is no longer of sufficient importance to warrant review by this Court.

CONCLUSION

The case was correctly decided in the Circuit Court of Appeals, and we therefore respectfully submit that the petition for a writ of certiorari should be denied.

STANLEY REED,
Solicitor General.

GEORGE C. SWEENEY,
Assistant Attorney General.

PAUL A. SWEENEY,
Attorney.

APRIL 1935.

APPENDIX

Section 9 (a) of the Trading with the Enemy Act of 1917, c. 106, 40 Stat. 411, 419, as amended by the Act of June 5, 1920, c. 241, 41 Stat. 977–978 and the Act of March 4, 1923, c. 285, 42 Stat. 1511 (U. S. C. A., Title 50, App. Sec. 9), provides as follows:

> SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person

from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

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